

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF )  
RODRIGO FIGUEIREDO GELIO ) DOCKET NO. 21-39

FINDINGS OF FACT, OPINION, AND ORDER

Rodrigo Figueiredo Gelio (“Mr. Gelio” “Grievant”), a Program Technician II, with the Department of Health (“Employer” “State”), grieves the decision of the Department of Health, Division of Alcohol and Drug Abuse Prevention (“ADAP” “Employer” “State”) to terminate him for unsatisfactory performance and failing to fulfill the functions of his job. Grievant alleges the Employer violated Article 14 of the Collective Bargaining Agreement (“CBA”) between the State and VSEA by terminating him without just cause, improperly bypassing progressive discipline and progressive corrective action in terminating him, and failing to apply discipline with a view toward uniformity and consistency. Grievant also claims the termination was in retaliation for writing a rebuttal to his performance evaluation.

The Vermont Labor Relations Board (“Board”) held hearings on the grievance on September 8, September 9, and September 23, 2022, and January 10, 2023, before Board members, Robert Greemore, Acting Chairperson, Alan Willard, and David Boulanger. Grievant appeared pro se. The State was represented by Assistant Attorney General Jamieson Duffy, Esq. The hearings were held on the Microsoft Teams Platform. The parties filed post-hearing briefs on March 3, 2023.

## FINDINGS OF FACT

### Background

1. Grievant began working at the Department of Health, Division of Alcohol and Drug Abuse Prevention (“ADAP”) as a Program Technician II within the Division of Alcohol and Drug Abuse Programs in September 2019.
2. ADAP distributes 45-50 million dollars of grant money annually to over 170 community partners that administer community programs for recovery and prevention.
3. Grievant’s primary responsibilities involved accounts payable. He was responsible for reviewing and processing grant invoices for the organizations providing services in the community. His minor roles included checking the mail, ordering supplies, and reviewing travel forms, contract invoices, and operational payments.
4. Prior to joining ADAP, Grievant worked as a Program Technician for the Department of Children and Families in March 2016, and was transferred to the Department of Corrections.
5. Grievant received training for his position from Emily Trutor. The training involved Ms. Trutor sitting side-by-side with Grievant for hours reviewing program codes, the use of the accounts payable system, and processing operational invoices. The two walked through each invoice one by one and entered them into the accounts payable system. Grievant was also provided with other resources including flowcharts, checklists, and PowerPoints.
6. When he first started his position at ADAP, Grievant was supervised by Tina Royer from September 2019-February or March 2020.

7. Article 14 of the Collective Bargaining Agreement (“CBA”) between the parties provides in pertinent part:

(e) In performance cases, the order of progressive corrective action shall be as follows:

- (1) Feedback, oral or written (records of feedback are not to be placed in an employee’s personnel file except in compliance with the Performance Evaluation Article;’
- (2) Written performance evaluation, special or annual, with a specified prescriptive period of remediation specified therein, normally three (3) to six(6) months;
- (3) Warning period of thirty (3) days to three (3) months, extendable for a period of up to six (6) months. Placement on warning status may take place during the prescriptive period if performance has not improved since the evaluation.
- (4) Dismissal.

State’s Exhibit 39, Article 14.

8. In November 2019, Grievant received a “Satisfactory” rating for his first months as a Program Technician II.
9. Sometime in early 2020, the ADAP experienced a reorganization. Emily Trutor became the Deputy Director of Substance Use, and Grievant was transferred to the supervision of Danielle Lewis, Division Administrator.
10. Ms. Lewis noticed that Grievant was having difficulty paying attention to details and that his invoices were delayed for several days or weeks. He did not prioritize older invoices over newer invoices and made repeated errors regarding grant numbers and program codes.
11. Ms. Lewis notified Grievant of these errors and mistakes by email, and explained the expected process, and provided examples to demonstrate the issues identified.
12. In December 2020, Ms. Lewis provided Grievant with a “Satisfactory” performance evaluation. Ms. Lewis was a new supervisor. Although she did not believe he was

performing at a satisfactory level, she did not want to give him an unsatisfactory performance evaluation because she was uncertain whether he was provided with sufficient notice of his unsatisfactory performance. The Human Resources Manager provided input on how to notify Mr. Lewis of his poor performance and the expectations for the position going forward.

13. Ms. Lewis was directed by Human Resources to include in the evaluation that Grievant needed to improve. The performance evaluation included the following note:

Throughout the time I have been your supervisor, I have brought errors to your attention and provided you with detailed information, not only to make corrections, but to have as reference to avoid making the same errors going forward. However, that has not been the case and I continue to find errors in your work. Although you have been given a satisfactory performance rating for this annual evaluation, your performance is bordering on unsatisfactory.

State's Exhibit 29.

14. The evaluation also noted that Grievant had three months to meet the performance expectations or risk an unsatisfactory evaluation. Grievant left the meeting to discuss his evaluation early due to not feeling well.
15. On January 27, 2021, Grievant filed a rebuttal to his evaluation claiming that he had not been trained for the position. Grievant also filed a Step 2 Grievance. The Deputy Director heard the Grievance and denied the claim.
16. The rebuttal also alluded to Grievant being the victim of prejudice or discrimination. He suggested that he was not being treated fairly. The Human Resources Manager investigated this claim and on February 19, 2021, determined that there was not sufficient evidence to substantiate allegations of workplace discrimination. In response to Grievant's request, Ms. Trutor returned to supervise Grievant to help him reach

satisfactory performance. After he was able to perform his duties at a satisfactory level, Ms. Lewis would return as Grievant's supervisor.

17. When she resumed supervision of Grievant, Ms. Trutor provided Grievant with additional training tools and resources. She scheduled time each week to review his workload and respond to his questions. She provided him with an inventory of his performance expectations to help monitor his progress.
18. On March 26, 2021, Ms. Trutor held a performance expectation demonstration with Grievant to help assess his level of knowledge and understanding of the position. Before the session, Ms. Trutor provided Grievant with a document outlining the performance expectations and monitoring methods for performance. It also notified Grievant of subjects on which he should be prepared to discuss at the session.
19. The session was performed on-line through TEAMS and required Grievant to walk through several scenarios he would face in reviewing grant invoices. The evaluations helped determine how long it took Grievant to process each invoice.
20. Ms. Trutor met with Grievant to review the evaluation and identified her concerns with the amount of time he was taking to process invoices. She presented him with examples of how he could improve his performance. Ms. Trutor encouraged Grievant to assess his own process and to review how long it takes him to process an invoice from start to finish.
21. After the review session, Grievant examined the six steps needed to process an invoice and estimated that it would take him approximately 37.5 minutes per invoice. Grievant's peers took about five to seven minutes to process invoices.

22. Ms. Trutor scheduled a second performance assessment two months after the first assessment. There was no improvement in his skills during the second assessment.
23. Ms. Trutor issued Grievant a Special Performance Evaluation in June 2021, because his performance remained unsatisfactory. The evaluation period ran from January 1, 2021, through June 12, 2021.
24. The Special Performance Evaluation included a chart that outlined his deficiencies in the required functions of his job, including meeting timelines, data entry accuracy, and prioritization of work. The Special Performance Evaluation also contained an Appendix with examples of how Grievant failed to meet the required functions of his job.
25. During the six months of review, Grievant also failed to attend weekly check-in meetings.
26. Grievant was placed on a Prescriptive Period of Remediation on June 30, 2021. Grievant was notified that his performance had to improve to a satisfactory level during the Prescriptive Period from June 30, 2021, to September 30, 2021. Grievant was provided with notice of the job expectations he was required to meet at a satisfactory level.
27. Ms. Trutor continued to supervise and work with Grievant, trying to help him improve his job performance. Rather than improve, Grievant's level of performance deteriorated.
28. During this time, Grievant did not process or move his invoices to the final step in his review process after July 8, 2021.
29. Because Grievant failed to demonstrate any effort to improve his performance in the areas identified for improvement, he was issued a Warning Evaluation and placed in a Warning Period. The Warning Evaluation was approved by Deputy Commissioner Dougherty. The warning period extended from August 6, 2021, to September 7, 2021.

30. Ms. Trutor emailed Grievant the Warning Evaluation along with a Memorandum outlining performance expectations during the Warning Period. The Warning Evaluation and Warning Period notified Grievant that the Accounting and Grant Management functions of his job would be evaluated during a supervision presentation or assessment. Ms. Trutor notified Grievant that she would meet with him weekly or as needed to review his performance.
31. The assessment or evaluation took place on August 20, August 23, and September 1, 2021. Ms. Trutor anticipated that the assessment would take one hour. After it became clear that Grievant would not finish the assessment in the allotted time, a second session was scheduled. Grievant did not complete the assessment during the second session, and a third assessment was scheduled. In total, it took Grievant three hours to complete the assessment.
32. The Assessment examined Grievant's level of understanding of account codes, fund codes, familiarity with organizations receiving federal funds, fiscal years, prior year versus current year, and grant agreements. During the assessment Grievant demonstrated that he lacked the knowledge required to complete the job expectations. Grievant did not know the account codes nor know how to access these codes other than asking others or using old emails to try to retrieve this information. He also did not know how to find program codes or grant information.
33. The assessment demonstrated Grievant's lack of understanding of the subject matter and ability to navigate the payment and grants management systems. At the time of the assessment, Grievant had been in his position for almost two years.

34. Ms. Trutor determined that Grievant lacked the ability to perform his job at a satisfactory level and initiated a Separation Evaluation.
35. On September 7, 2021, Grievant was issued a Separation Evaluation signed by Ms. Trutor and authorized by Deputy Commissioner Dougherty.
36. The Separation Evaluation detailed Grievant's failure to demonstrate a satisfactory level of performance on his job expectations as well as his lack of effort to improve his performance.
37. Deputy Commissioner Dougherty was concerned that Grievant was not able to process invoices in a timely way or with accuracy and that these shortcomings could impact the grant recipients dependent on funding from ADAP to provide services to the community.
38. On September 7, 2021, Deputy Commissioner Dougherty issued Grievant a Loudermill letter advising him that the State was contemplating imposing serious discipline on him up to and including dismissal for his failure to meet the satisfactory job expectations and fulfill the duties and responsibilities of the job to the best of his ability, as required in Vermont State Personnel Policy 5.6. The letter summarized Grievant's failure to improve his job performance after receiving his Unsatisfactory Performance Evaluation on June 30, 2021, and subsequent evaluations intended to improve his performance.
39. Grievant was placed on Temporary Relief from Duty on September 7, 2021.
40. On September 20, 2021, a Loudermill hearing was held.
41. The State prepared a Twelve Factor Analysis Memorandum approved by Commissioner Dougherty, detailing the reasoning for the termination decision. The Memorandum outlined the progressive steps the State took in its attempt to help Grievant improve his performance to a Satisfactory level.



42. Deputy Commissioner Dougherty dismissed Grievant from his position on October 15, 2021. Deputy Commissioner Dougherty did not make the decision lightly but determined that despite significant intervention by Emily Trutor and Danielle Lewis, Mr. Gelio was unable or unwilling to perform the duties of the position in a satisfactory manner

### OPINION

Grievant challenges the decision of the State to discharge him as violative of the Collective Bargaining Agreement, lacking just cause, and retaliatory for his filing a rebuttal to his Satisfactory Review.

The Collective Bargaining Agreement between the parties provides that when addressing performance issues, the State must adhere to the following order of progressive corrective actions: (1) oral or written feedback; (2) written performance evaluation; (3) warning period, and (4) dismissal. The State followed the steps of progressive corrective action before deciding to dismiss Grievant. Grievant was provided with written feedback by Ms. Lewis which included the specific feedback in the December 2020 Evaluation. Thereafter, Grievant was provided with a Special Performance Evaluation, then a Warning Period of thirty days. At each of the steps, Grievant was provided with notice of his performance deficiencies and ways to improve. In response to his request, his supervisor was changed, and Ms. Trutor dedicated time and attention to Grievant retraining him so that he may satisfactorily perform his job. Grievant never demonstrated any progress. Despite these efforts, by the time the warning period assessment took place in September 2021, Grievant proved unable to perform the basic functions of his job. The State adhered to the CBA.

Where the dismissal is based on performance deficiencies, the CBA, provides that “the Vermont Labor Relations Board shall sustain the State’s action as being for just cause unless the

grievant can meet the burden of proving that the State's action was arbitrary and capricious." CBA Article 14, paragraph 14. This is a difficult standard to meet. "[A]n 'arbitrary' decision is one fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance." Lewandoski and VSCFF v. Vermont State Colleges, 142 Vt. 446, 453-54 (1983) (quoting United States v. Carmack, 329 U.S. 230, 243–44 n. 14, 67 S. Ct. 252, 258 n. 14) (internal quotations omitted).

The decision to terminate Grievant was considered and deliberate. Ms. Trutor and Ms. Lewis documented Grievant's shortcomings and inability to comprehend the basic elements of his job. He failed to open emails timely, he did not know how to find the relevant program codes or grant information. Ms. Trutor observed Grievant's thought process and discomfort in navigating the system. The decision to terminate Grievant was based on documented performance and observed deficiencies.

Deputy Commissioner Dougherty considered and evaluated the documentation supporting the Special Evaluation and Warning Evaluation and reviewed and approved the Twelve Factor analysis before deciding to terminate Grievant. She also considered the time dedicated by her staff trying to boost Grievant's performance. The decision was not made on a whim.

Grievant's performance deficiencies have been identified since 2020. There has been clear notice that he needs to improve his performance since at least December 2020. At each stage of the progressive corrective action, Grievant has been provided with clear and detailed notice of the expectations of his job, that he needs to improve, and what he needs to do to meet those expectations. On August 6, 2021, Grievant was notified in the Warning Period Notice that he could be dismissed if he failed "to adequately improve your level of performance and to

maintain it at a satisfactory level by the end of the warning period.” State’s Exhibit 58. Grievant has demonstrated that he cannot perform his job duties at a satisfactory level. The months Ms. Trutor and others dedicated to providing one-on one training sessions, interactive performance session, resources, and supervisory feedback have not advanced Grievant’s understanding of his duties nor his ability to perform the job. The decision to terminate Grievant was not arbitrary and capricious.

Grievant claims the State retaliated against him in response to his rebuttal to his Satisfactory Evaluation. To establish a retaliation claim, Grievant must prove that he engaged in a protected activity or is a member of a protected class, that ADAP took an adverse action against him, and that the adverse action was because of the protected activity or his protected class. See Grievance of Rosenberg v. Vermont State Colleges, 2004 VT 42, ¶¶ 10-14, 176 Vt. 641, 644–46 (2004); Carbone v. State of Vermont, 16 VLRB 282, 300 (1993); Barre City Educational Support Personnel Association v. Board of School Commissioners of the City of Barre, 2 VLRB 244, 247 (1979).

Grievant has failed to present any evidence that the State took any adverse action against him because of his filing his rebuttal. The record is replete with evidence that Grievant was provided with adequate notice of his unsatisfactory performance, yet despite opportunities to improve, failed to improve and achieve satisfactory performance.

Grievant failed to meet his burden of proving the State violated Article 14 of the CBA, by showing his dismissal for poor performance was arbitrary and capricious. Grievant also failed to present any evidence that his dismissal was in retaliation for his filing a rebuttal to his December 2020 Satisfactory Evaluation.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Rodrigo Figueiredo Gelio is DISMISSED.

Dated this 19th day of March 2024, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s Robert Greemore

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Robert Greemore, Chairperson

/s/ David Boulanger

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David Boulanger

/s/ Alan Willard

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Alan Willard